



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulations 9 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011.**

**Chamber Ref: FTS/HPC/PR/19/1377**

Re: Property, 10 Monkton Crescent, Coatbridge, ML5 5GA (“the Property”)

Parties:

Sharon Wright, 1 Calder Court, Coatbridge, ML5 5GA (“the Applicant”)

John Paul Clark, Donna Clark, Spings 10, Street 1, Villa 78, Dubai, United Arab Emirates; M-1 Swaco, PO Box 7623, Dubai, United Arab Emirates (“the Respondent”)

Tribunal Members:

Karen Kirk (Legal Member) Eileen Shand. (Ordinary Member)

1. This full evidential hearing was fixed at the Case Management Discussion on 20<sup>th</sup> December 2019 in terms of Rule 24 of the Procedure Rules and concerned an Application under Regulations 9 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (hereinafter referred to as “the Regulations”). The purpose of the Hearing was first to determine the issue of timebar as set out in the Notes to the Case Management Discussion on 20<sup>th</sup> December 2019. The purpose of the hearing was explained to parties and the issue of timebar was dealt with as a preliminary issue first by the Tribunal. The procedure of the hearing as a whole was made clear to all parties at the beginning. Parties understood a final decision would be made.

## **2. Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment of the sum of £1800 in terms of Regulation 10(a) of the Regulations should be made.**

## **3. Attendance and Representation**

The Applicant was present and was also represented by Jim Melvin, Coatbridge Citizens Advice Bureau, Ellis Street, Coatbridge, ML5 3AA.

The Respondent attended the Tribunal by conference call and without representation.

#### **4. Preliminary Matter – Timebar**

##### Applicants Evidence - Summary

- The Applicant's position was that she left the property after returning her keys to same on 9<sup>th</sup> February 2019 to the Respondents sister, Catherine Clark. She said she had fallen into arrears of rent for around 5 weeks from December 2018. She had received a letter from the respondent at the end of December 2018 showing that she was in rent arrears. The statement however had went back to February and March 2018 and she considered she had paid these monies to the Respondent. The Applicant said she was asked when she would be making payment to the rent arrears. She recalled a few days later in January 2019 the Respondent's sister, Catherine Clark attended at her home and provided her a Notice to Quit. She said when she read it it said she had 14 days to vacate the property and she didn't understand it. She was in contact with the landlord via whats app messages and the Respondent told her that she was in arrears and she could stay if she paid the arrears. She said she told the Respondent that she would need to investigate what had happened regarding the payments she had made in February and March 2018 and that she needed more time. She said she was told by message that she couldn't expect to stay without making payment and she did not trust the Respondent not to change the locks and he wanted her to pack up and leave she said. She was asked to meet the Respondents sister and she messaged her to arrange a meeting at the property. She cleaned the property and she met Catherine Clark on 9<sup>th</sup> February 2019 at the property. She gave her the keys and she received a receipt.

##### Submission

- The submission on behalf of the Applicant was that a deposit was paid for the property to the Respondent on 18<sup>th</sup> January 2018 and that no steps had been taken by the Respondent to protect it. Parties entered into a purported Short Assured tenancy on 18<sup>th</sup> January 2018. On 9<sup>th</sup> January 2019 the Respondent served a Notice to Quit and an AT6 on the Respondent and sought repossession of the property on the grounds of rent arrears. Said notice expired on 24<sup>th</sup> January 2019. The Applicant left the property on 9<sup>th</sup> February. The submission was that the earliest possible date the purported tenancy could come to an end was the 9<sup>th</sup> February 2019. The application was lodged on 7<sup>th</sup> May 2019 and the submission was that it was not time barred as it had been lodged within 3 months of the end of the tenancy and accordingly was timeous. The deposit has never been returned and the submission was further that the tenancy could not be a Short Assured Tenancy as it was created after the coming into force of the Private Housing (Tenancies) (Scotland) Act 2016 on 1<sup>st</sup> December 2017. The Applicant's submission was that by virtue of said Act the tenancy must be regarded as a Private Residential Tenancy. The

submission further was that as a PRT said tenancy could not be unilaterally terminated without service of a Notice to Leave under Section 62 of the 2016 Act. The submission was that the Tenancy is a PRT and as such given no Notice to Leave was issued and the Applicant did not leave until 9<sup>th</sup> February 2019 the Application was timeous.

#### Respondents Evidence – Summary & Submission

- The Respondent's position was that he had issued the tenancy agreement for the property whilst he was out the country. He has been out of the country working except for yearly visits home since 2008. He said in evidence that everything he had done was in good faith regarding the property and he had been unaware of a law change. He said the contract was issued to the Applicant in January 2018 and the Applicant paid 1 months rent and a deposit. He said he received after that £150 only for the next month which was £450 short and the following month he received £300, so was £300 short. He said the monthly rental was £600 and that the Applicant was in rent arrears from the beginning. He said the Applicant did not pay rent in May 2018 and he did not accept the position that the Applicant was unaware she was in rent arrears until the end of December 2018. His position was that he made the Applicant aware of the position throughout. He gave evidence that the Applicant was in arrears by December of £2000. He then issued a Notice to Quit and the Applicant was due to leave on 24<sup>th</sup> January 2019. He said he was not getting his rent and he was bending over backwards for the Applicant.
- The Respondent then said that he then heard from the Applicant to says she had not been paid and an end date of the end of January 2019 was agreed. He was accommodating the Applicant he said. No payment had been received and he was told that the Applicant would be moving to live with her sister. He said he complied with every regulation and the mistake on his part was the issuing of the wrong tenancy but he had done so in good faith. He said he sent her messages after she said she was leaving to get an end date for her leaving. He agreed the property was left clean. He accepted that the receipt from his sister for the keys was accurate although he could not recall if the Applicant left on the 7<sup>th</sup> or 9<sup>th</sup> February 2019. He said he told her she would be paying rent until she left. The Respondent said after she didn't leave at the end of January 2019 he pressed to get a new date from the beginning of February through messages and he said this went on for days until the Applicant met his sister to return the keys. He accepted this would have been on 9<sup>th</sup> February 2019 if his sister had provided a receipt.

#### Outcome of Preliminary Matter

- The Tribunal considered after hearing evidence and submissions that the Application had been lodged timeously and could be considered. The Tribunal as explained at the outset then went on to deal with the Application substantively following the preliminary issue of Time bar being determined.

## **5. Applicant's Case.**

The Applicant's submission was that the Respondent failed to lodge the deposit in a secure scheme within 30 working days of the beginning of the tenancy in January 2018 and referred to Regulation 3 of the Tenancy Deposit Regulations 2011. Further the Applicant's submission was that the landlord had also failed to provide information to the tenant as required by regulation 42 of the Regulations

The Applicant's submission was that the landlord had a duty to pay the Applicant a sanction of up to 3 times the deposit if the Regulations had not been satisfied. The Applicant's submission was that in terms of case law it was the Tribunal's discretion when considering what award to grant but that it must be fair, just and proportionate on the facts of the case. The Applicant's representative sought to ask the Respondent whether he let other properties and what advice he got but the Respondent refused to answer any questions other than those regarding the property concerned.

## **6. Respondent's Case**

The position of the Respondent was that he said he accepted he did not pay the deposit into an approved scheme. He said anything he had done he had applied the law and he had given the Applicant every opportunity under the contract he provided her. He said he was left with no option regarding the tenancy due to rent arrears and that he was not aware at the time of the deposit regulations. He said he has returned to Scotland once a year since 2008 and has been posted in his job in Kuwait, Oman and other remote locations and was not aware the law on tenancies had changed. The Respondent said he now secures deposits in terms of the regulations. The Respondent would not say if he lets any other properties other than the property concerned.

## **7. Findings in Fact and Reasons for Decision**

### *Time Bar Preliminary Issue*

1. The Application was brought timeously in terms of regulation 9(2) of the Tenancy Deposit Regulations 2011 ("The Regulations").
2. The Applicant's tenancy commenced on 22nd January 2018.
3. The Tenancy purported to be a Short Assured Tenancy however the Tenancy in terms of section 1 of the Private Housing (Tenancies) (Scotland) Act 2016 was a Private Residential Tenancy.
4. The Applicant received a Notice to Quit on the 9<sup>th</sup> January 2019.
5. The Applicant resided in the property until 9<sup>th</sup> February 2019. This was a matter of agreement before the Tribunal.

6. The Applicant had a meeting with the Respondent's sister, Catherine Clark on 9<sup>th</sup> February 2019 where the keys for the property were handed over and a receipt given. The Tenancy ended when the Applicant ceased to occupy same on 9<sup>th</sup> February 2019, having regard to Section 50(1) of the Private Housing (Tenancies) (Scotland) Act 2016. No Notice to leave had been issued to the Applicant in any event. The Notice to Quit issued had no relevance to the Application of issues the Tribunal had to determine.
7. In terms of Section 9(2) of the Regulations an Application must be made within 3 months after the Tenancy had ended.
8. The Tenancy having ended on 9<sup>th</sup> February 2019 and the Application having been lodged on the 7<sup>th</sup> May 2019 the Tribunal determines has been brought timeously.
9. In terms of Regulation 10 of the Regulations if the Tribunal is satisfied that the landlord did not comply with any duty detailed in Regulation 3 of the Regulations then the Tribunal must order a landlord to pay the tenant or tenants an amount not exceeding three times the amount of the tenancy deposit.
10. The Tribunal was satisfied that the Respondent did not register the deposit with a deposit protection scheme as required by Regulation 3. This was accepted by the Respondent at the hearing and also this was noted as being accepted in the Case Management Discussion Note of 20<sup>th</sup> December 2019.
11. The Tribunal was also satisfied that a deposit of £600 had been paid by the Applicant to the Respondent on 18<sup>th</sup> January 2018 and a receipt was given. This was accepted by the Respondent.
12. The Respondent did not deny that he had not registered the said deposit as required by the Regulations.
13. In his representations, he did not provide any valid or relevant submissions regarding the non-registering of the deposit which was contrary to the regulations, other than to say it was an error and that he being out the country was not aware of any change in the law.
14. As the Tribunal was satisfied a breach of the regulations had occurred the Tribunal had to make an order in terms of Regulation 10.
15. In terms of Regulation 10 the Tribunal is obliged to make an order up to 3 times the deposit of the applicants to the respondent.
16. When considering the Order and level of sanction the Tribunal must have regard to the severity of the breach and any mitigating factors.
17. The deposit was unsecured throughout the tenancy. The applicants deposit was retained by the respondent and she did not have the protection or services

of a deposit protection scheme to engage in arbitration or to receive a return of said monies, which remain unreturned.

18. In the case of *Jenson v Fappiano* 2015 G.W.D 4-89 in relation to the amount of such an Award under regulation 10 of the Regulations it was noted that a judicial analysis of the nature of the non-compliance was required and a value attached to reflect a sanction which was fair and proportionate and just given the circumstances.
19. It was further noted that the Sheriff said in said case that the value was not the starting point of three times the deposit minus the mitigating factors it was what was fair and proportionate in the exercise of balanced judicial discretion.
20. The Court of Session in *Tenzin v Russell* 2015 Hous. L.R 11 held that any payment in terms of Regulation 10 of the Regulations is the subject of judicial discretion after careful consideration of the circumstances of the case.
21. The Tribunal was of the view that an Award should be made in the upper end of the scale as the deposit had been unsecured for the duration of the tenancy, not returned and there had been real practical prejudice to the Applicant. The explanation given for the breach was one of a complete lack of knowledge and understanding of the relevant legislation and provisions in respect to the tenancy and deposit concerned. The Respondent had not provided the necessary information to the Applicant and the Respondent continued to retain the deposit. Accordingly in balancing all the circumstances and after hearing submissions and the evidence of both parties it found the Applicant entitled to an award of 3 times the deposit to the sum of £1800.

### Right of Appeal

**In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.**

LKaren Kirk

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Legal Member/Chair

10/2/20  
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Date